



In the Missouri Court of Appeals Western District

STATE OF MISSOURI,)
Respondent,)
v.) **WD69199**
) **FILED: April 20, 2010**
MAURA L. CELIS-GARCIA,)
Appellant.)

APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY THE HONORABLE LARRY D. HARMAN, JUDGE

**BEFORE: DIVISION ONE: LISA WHITE HARDWICK, PRESIDING JUDGE,
JAMES M. SMART, JR. AND ALOK AHUJA, JUDGES**

Maura Celis-Garcia was convicted by jury on two counts of first-degree statutory sodomy, Section 566.062.¹ On appeal, she contends the circuit court erred in instructing the jury on the sodomy charges and in admitting certain testimony from two expert witnesses. For reasons explained herein, we find no error and affirm the convictions.

FACTUAL AND PROCEDURAL HISTORY

Ms. Celis-Garcia is the mother of two daughters, C.J. and K.J. In April 2006, C.J. and K.J., ages five and seven, were removed from the custody of Ms.

¹ All statutory citations are to the Revised Missouri Statutes 2000, as updated by the Cumulative Supplement 2009.

Celis-Garcia due to allegations of physical abuse. The children were placed with foster parents.

In June 2006, C.J. and K.J. attended a supervised visitation with Ms. Celis-Garcia. Prior to the visitation, the children expressed fear of being left alone with their mother. During the visitation, K.J. visibly trembled when she found out that her mother's boyfriend, Jose Flores, was waiting outside to drive Ms. Celis-Garcia home. The children refused to leave the building where the visitation occurred until they were certain that Mr. Flores had left the area.

A few weeks later, C.J. told her foster mother that Ms. Celis-Garcia and Mr. Flores had touched her breasts, vagina, and buttocks with their hands on several occasions when she lived with Ms. Celis-Garcia. Shortly thereafter, K.J. also stated that her mother and Mr. Flores had touched her breasts, vaginal area, and buttocks. The foster parents promptly informed the Division of Family Services about the allegations of sexual abuse.

Both children were taken to Children's Mercy Hospital for sexual assault forensic examinations (SAFE). The SAFE reports indicated that C.J. had missing hymenal tissue and K.J.'s genitals were normal.

Ms. Celis-Garcia was charged with one count of first-degree statutory sodomy against C.J. and one count of first-degree statutory sodomy against K.J. At the jury trial, the State presented testimony from the children by videotaped deposition.

During her deposition, K.J. described three incidents when Ms. Celis-Garcia and Mr. Flores touched her “three private places.” She identified her private places as her breasts, vaginal area, and buttocks. All of the incidents occurred in and around the home where the children lived with their mother and maternal grandmother. In the first incident, which occurred in an enclosed porch behind the house, K.J. testified that Ms. Celis-Garcia and Mr. Flores removed her pants, left on her panties, and touched her three private places under her clothing with their hands.

The second incident occurred in Ms. Celis-Garcia’s bedroom. K.J. testified that her mother and Mr. Flores took off all of her clothes, restrained her hands and feet with handcuffs, hung her from a hook on the wall in the bedroom closet, and then touched her three private places with their hands. K.J. said that Ms. Celis-Garcia and Mr. Flores threatened to kill her if she told anyone what they had done to her.

The third incident occurred when K.J. and C.J. were preparing to take a bath. K.J. testified that Ms. Celis-Garcia and Mr. Flores took her and C.J. from the bathroom to the enclosed porch behind the house, where both adults used their hands to touch the children’s three private places.

During her deposition, C.J. testified that Ms. Celis-Garcia and Mr. Flores had touched her front “privacies” and “butt” with their hands on more than one occasion. One incident occurred in Ms. Celis-Garcia’s bedroom. Another incident occurred when Ms. Celis-Garcia touched her in a shed behind the house.

C.J. testified that Ms. Celis-Garcia and Mr. Flores had touched K.J. on the "back," "front," and "boobs" with their hands in Ms. Celis-Garcia's bedroom on more than one occasion. C.J. also recalled multiple incidents when Ms. Celis-Garcia touched K.J. while they were behind the house in the enclosed porch and in the shed. C.J. testified that she did not tell anyone what her mother and Mr. Flores had done because she was afraid they would do something to her that was even worse.

A police officer testified that a search was conducted of the house where the children lived with their mother. Hooks were found in the master bedroom closet and wall of the residence, and holes were found in the bedroom wall at eye level.

A caseworker for the Children's Division testified that she met with the children in June 2006 to discuss the abuse allegations. Both K.J. and C.J. told the caseworker that they had been handcuffed by their mother and Mr. Flores during some of the incidents of touching. K.J. showed the caseworker scars on her wrists from the handcuffs.

The State also presented trial testimony from Ellen Walls, a licensed clinical social worker who had counseled the children before and after they made the allegations of sexual abuse, and Maria Mittelhauser, an interviewer for Childsafe, a child advocacy center for abused children. Ms. Walls testified that both children had described to her incidents of sexual abuse by Ms. Celis-Garcia and Mr. Flores.

Ms. Mittelhauser explained her forensic interview process with the children; her separate videotaped interviews with C.J. and K.J. were played for the jury.

The defense presented one witness, Maria Garcia, the mother of Ms. Celis-Garcia and the grandmother of C.J. and K.J. Ms. Garcia testified that she had never witnessed her daughter or Mr. Flores sexually abuse the children. She also testified that C.J. and K.J. had a reputation for lying.

At the close of evidence, the jury found Ms. Celis-Garcia guilty on both counts of first-degree statutory sodomy. The court sentenced her to concurrent prison terms of twenty-five years on each count.

POINTS ON APPEAL

1. Jury Instructions

In her first point on appeal, Ms. Celis-Garcia contends the court erred in submitting verdict directors that did not include detailed information about the alleged acts of sodomy and thereby violated her right to a fair trial, unanimous jury verdict, and freedom from double jeopardy. Rule 28.03² requires that counsel make specific objections to instructions or verdict forms before the jury retires to consider its verdict. Ms. Celis-Garcia concedes that her claim of instructional error is not preserved for appellate review because her counsel failed to object to the verdict directors at trial. Thus, she seeks review under Rule 30.20 for “plain errors affecting substantial rights.”

² All rule citations are to the Missouri Supreme Court Rules unless otherwise indicated.

“Plain error review involves two steps.” *State v. Beggs*, 186 S.W.3d 306, 311 (Mo.App. 2005). First, this court must determine whether the trial court committed an evident, obvious, and clear error affecting the defendant’s substantial rights. *Id.* Second, even if a clear error is found, this court cannot grant relief unless it determines that manifest injustice or a miscarriage of justice resulted from the error. *Id.* at 311-12.

Ms. Celis-Garcia has the burden of establishing that there was plain error and that it resulted in a manifest injustice or miscarriage of justice. *State v. Moyers*, 266 S.W.3d 272, 285 (Mo.App. 2008). “Instructional error seldom rises to the level of plain error.” *State v. Wright*, 30 S.W.3d 906, 912 (Mo.App. 2000). To demonstrate plain error in jury instructions, Ms. Celis-Garcia must show more than mere prejudice; she must establish that the trial court has so misdirected or failed to instruct the jury that the instructional error affected the jury’s verdict. *Id.*

The circuit court submitted Instruction No. 6, which directed the jury as follows:

As to Count 1 regarding defendant Maura L. Celis-Garcia, if you find and believe from the evidence beyond a reasonable doubt:

First, that between the dates of January 1, 2005 and March 31, 2006, in the County of Saline, State of Missouri, defendant or Jose F. Flores placed her or his hand on [C.J.’s] genitals, and

Second, that such conduct constituted deviant sexual intercourse, and

Third, that at that time [C.J.] was less than twelve years old, then you are instructed that the offense of statutory sodomy in the first degree has occurred, and if you

further find from the evidence beyond a reasonable doubt:

Fourth, that with the purpose of promoting or furthering the commission of that statutory sodomy in the first degree, the defendant Maura L. Celis-Garcia acted together with or aided Jose F. Flores in committing that offense, then you will find the defendant Maura L. Celis-Garcia guilty under Count 1 of statutory sodomy in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant Maura L. Celis-Garcia not guilty of that offense.³

The language of Instruction No. 7 was identical except that it referred to "Count 2" instead of "Count 1" and "[K.J.]" instead of "[C.J]."

Ms. Celis-Garcia argues these verdict directors failed to insure a fair trial and unanimous jury verdict because they did not precisely indicate when, where, and how the alleged acts of sodomy occurred. The State presented evidence that Ms. Celis-Garcia had placed her hands on the children's genitals at different times and locations. Without some differentiation in the verdict directors, Ms. Celis-Garcia contends the jury could not have known which specific act it was to consider. She asserts that some jurors may have convicted her for placing her hand on C.J.'s genitals in the shed, while others may have disbelieved that such conduct occurred in the shed and, instead, convicted her based on conduct that allegedly occurred in

³ By apparent inadvertence, the verdict directors extended the "January 1, 2006 to May 31, 2006" time-frame for which Ms. Celis-Garcia was charged in the indictment, to "January 1, 2005 to May 31, 2006" in the verdict directors. Ms. Celis-Garcia has not raised any issue with regard to this variance, and it does not affect our decision because "[i]n [sex offense] cases the state is not confined in its evidence to the precise date stated in the information, but may prove the offense to have been committed on any day before the date of the information and within the period of limitation." *State v. Mills*, 872 S.W.2d 875, 878 (Mo.App. 1994).

the bedroom. She argues there is no assurance that all twelve jurors agreed that she committed the same act of hand-to-genitals sodomy.

Our State constitution provides that “the right of trial by jury . . . shall remain inviolate.” **Mo. CONST. art. I, § 22(a)**. This provision guarantees that the accused shall enjoy a trial by twelve jurors who unanimously concur in the guilt of the defendant. ***State v. Goucher*, 111 S.W.3d 915, 917 (Mo.App. 2003)**. In general, the unanimity rule requires the jurors to be in substantial agreement regarding the defendant’s specific conduct as a preliminary step in determining whether the defendant is guilty of the charged offense. ***See United States v. Gipson*, 553 F. 2d 453, 457-58 (5th Cir. 1977)**. The jurors need only agree on the specific conduct necessary to satisfy the factual predicate and statutory elements of the offense.

Ms. Celis-Garcia was charged with two counts of first-degree statutory sodomy, which occurs when a person “has deviate sexual intercourse with another person who is less than fourteen years old.” **§ 566.062**. Deviate sexual intercourse is defined, in relevant part, as “any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person ... done for the purpose of arousing or gratifying the sexual desire of any person.” **§ 566.010(1)**. Thus, as one element of the charge of first-degree statutory sodomy, the jury is required to determine whether the defendant was involved in a specific physical act constituting deviate sexual intercourse. Instructions Nos. 6 and 7 directed the jury to consider whether Ms. Celis-Garcia engaged in deviate sexual intercourse by

placing her hand on the children's genitals. The verdict director sufficiently identified the specific act of sodomy – hand-to-genital contact – that constituted the criminal offense.

Ms. Celis-Garcia cites two prior cases where the disjunctive submission of an element of an offense was held to violate the defendant's right to jury unanimity. We note, however, that both cases involved situations where two different acts of sodomy were submitted in a single disjunctive instruction. ***State v. Oswald*, 306 S.W.2d 559, 563 (Mo. 1957)** (jury instructed to find defendant guilty if he inserted his genitals into the mouth *or* rectum of the victim); ***State v. Mackay*, 822 S.W.2d 933, 936 (Mo.App. 1991)** (jury instructed to find defendant guilty if he placed his hand *or* mouth on the genitals of the victim). Here, in contrast, the jury was only asked to consider whether Ms. Celis-Garcia was involved in an act of hand-to-genital contact with each of the children. The specific act of sodomy was not presented in the disjunctive.⁴ Thus, Ms. Celis-Garcia could not have been found guilty of first-degree statutory sodomy unless all of the jurors agreed that she placed her hand on the children's genitals.

Ms. Celis-Garcia also argues that the verdict directors undermined her right to jury unanimity because they failed to identify the particular dates and locations where the acts of sodomy allegedly occurred. We consider her argument in light of

⁴ We acknowledge that the verdict directors included a disjunctive submission allowing the jury to find Ms. Celis-Garcia guilty if she committed the acts of sodomy *or* acted together with Mr. Flores in doing so. Our court has recognized that this disjunctive use is proper in accomplice liability instructions when the evidence supports a finding that either person committed the act. ***State v. Shockley*, 98 S.W.3d 885, 891-92 (Mo.App. 2003)**. Ms. Celis-Garcia has not challenged the submission of accomplice liability in this appeal.

the guidelines to the Missouri Approved Instructions (MAI) and the facts and circumstances before the circuit court during trial. *See State v. Hoban, 738 S.W.2d 536, 541 (Mo.App. 1987).*

The MAI provides the following guidance for verdict directors in cases where the defendant is charged with multiple similar offenses:

If the defendant is charged with more than one crime involving the same victim on the same day, the time should be shown on each instruction . . .

. . .

If it is impossible to fix the occasion of the offense by time or date, the instruction should be modified by the Court to identify the occurrence by some other reference.

. . .

The place of the offense may become of “decisive importance” under certain circumstances, such as . . . where the defendant may have committed several separate offenses against the same victim at the same general location within a short space of time.

In such a situation, upon request of the defendant or on the Court’s own motion, the place should be more definitely identified, such as “the front bedroom on the second floor,” “the southeast corner of the basement,” etc.

MAI-CR 3d 304.02, Notes on Use 4(c), 5.

In considering these Notes on Use, we recognize the need to balance the rights of the accused against the practical needs of our justice system in cases that involve sexual offenses against children. Our courts allow fewer details in charging such crimes because child victims may find it difficult to precisely recall the dates of the offenses against them. *Hoban, 738 S.W.2d at 541.* Even if a specific date for the offense is not alleged, the defendant is adequately protected by the requirement that the jury must find him or her guilty beyond a reasonable doubt.

Id. The jury can weigh the inability of the victim to specify the time and date of the crime in determining whether that standard of guilt has been met. *Id.* at 541-42.

Here, Ms. Celis-Garcia was charged with two acts of sodomy that occurred over a period of several months. Due to the young age of the children and the delay in reporting the abuse, it was not possible to determine the exact dates when the crimes were committed in particular locations, or even exactly how many distinct criminal acts were perpetrated against the minor victims in particular locations. That explains why the State charged Ms. Celis-Garcia with only one act of sodomy against each child.

With regard to the location of the offenses, the children identified several places in and around their home where multiple acts of sexual abuse occurred. Neither the charging instrument nor the verdict directors specified the location of the offenses. Although Ms. Celis-Garcia did not request the court to include any location details in the verdict directors, she now argues the court should have done so on its own motion.

A similar argument was rejected in *State v. Smith*, where the defendant was charged with two counts of first-degree sexual misconduct against the same minor victim. 32 S.W.3d 134 (Mo.App. 2000). The two acts leading to the charges occurred at the same address but in different locations within the house and on different days. *Id.* at 135. At trial, the verdict directors for each count were completely identical, except for reference to the different count numbers, and did

not include any information about the location of the offenses. *Id.* The defendant did not object to the verdict directing instructions. *Id.* The jury convicted the defendant on one count and acquitted the defendant on the other. *Id.* at 134. On appeal, the defendant argued plain error in the verdict directing instructions because there was no assurance that all jurors found him guilty of the same incident of sexual misconduct. *Id.* at 135.

In declining to grant plain error relief, we held:

Rule 28.03 serves the salutary purpose of preventing sandbagging, by requiring counsel to present objections to instructions at a time when the trial court is able to make corrections shown to be appropriate. No longer may counsel stand by silently, and then, if the verdict is adverse, seek a new trial because of alleged error in instructions which has not been asserted earlier. Counsel are obliged to study tendered instructions carefully and the court should allow reasonable time to study the submissions. It is logical to assume that, if counsel familiar with the case cannot perceive infirmities in instructions, then the chance that the jury would be affected by them is minimal.

We have no hesitation in saying that the prosecution should have made it clear that the two instructions applied to different incidents. This could have been accomplished simply by including more detail as to the location of each offense. But the instructions are legally correct and, if the point had been timely raised, the court would have undoubtedly complied with a request for clarification. We consider the appellant's suggestion that some jurors might have had one touching in mind when voting for guilt on Count II, while other jurors found a different touching, highly unlikely. What is much more probable is that the jurors discussed each incident separately and found guilt on the only touching all of them agreed to. The parties have cited cases involving similar infirmities, but we do not consider them in detail because of the defendant's failure to comply with Rule 28.03. The defendant, having failed in this respect, does not persuade us that there is plain error requiring us to excuse her failure to comply with the governing rule.

Id. at 136 (internal citations omitted).

This case is analogous to **Smith**. The verdict directors on the first-degree sodomy charges were legally sufficient but could have been modified upon request. We find it significant that, during trial, Ms. Celis-Garcia proposed a set of lesser-included offense instructions that contained the same description of the alleged offenses as those submitted by the circuit court, which she now argues are legally insufficient.⁵ None of her proposed verdict directors included any reference to the house or the specific locations in and around the house where the lesser-included offenses of second-degree child molestation allegedly occurred. Given that the defendant did not find it necessary to include such information in drafting her own

⁵ At trial, the circuit court rejected the verdict directors tendered by Ms. Celia-Garcia as Instructions C and D. Instruction C stated:

As to Count 1, if you do not find the defendant, Maura Celis-Garcia, guilty of statutory sodomy in the first degree as submitted in Instruction No. ____, you must consider whether she is guilty of child molestation in the second degree under this instruction.

If you find from the evidence beyond a reasonable doubt:

First, that between the dates of January 1, 2006 and March 31, 2006
in the County of Saline, State of Missouri, the defendant, Maura Celis-Garcia, placed her hands on [C.J.'s] genitals, and

Second, that she did so for the purpose of arousing or gratifying her
own sexual desire, and

Third, that at that time, [C.J.] was less than seventeen years old, then
you are instructed that the offense of child molestation in the second degree
has occurred, and if you further find and believe from the evidence beyond a
reasonable doubt:

Fourth, that with the purpose of promoting or furthering the
commission of that child molestation in the second degree, the defendant,
Maura L. Celis-Garcia, acted together or aided Jose F. Flores in committing
that offense,

then you will find the defendant Maura L. Celis-Garcia, guilty under
Count 1 of child molestation in the second degree.

However, unless you find and believe from the evidence beyond a
reasonable doubt each and all of these propositions, you must find the defendant, Maura L.
Celis-Garcia, not guilty of that offense.

The language of Instruction No. D was identical except that it referred to "Count 2" instead of "Count 1" and "[K.J.]" instead of "[C.J.]."

instructions, we cannot convict the court of plain error in failing to include additional factual circumstances of the offenses.

The omission of specific details in the verdict directors was consistent with Ms. Celis-Garcia's apparent defense strategy. During closing arguments, defense counsel focused on the vagueness of the children's allegations and sought to portray them as "liars."⁶ The defense had little interest in directing the jury's attention to the physical location of the offenses because its primary focus was to dispute that the abuse had ever occurred. While the circuit court might have had an obligation to provide more specific instructions if requested by Ms. Celis-Garcia, the failure to do so on its own motion under these circumstances was not evident, obvious, and clear error.⁷

⁶ Defense counsel's closing arguments including the following statements:

Unfortunately, at no time during this whole continuum of events did anybody step back and for one second think or consider, could these girls be lying? What if what they're saying is not true...

But they were all over the waterfront in terms of how these things happened to them. The only thing they said several times was touching, touching in the privacies. And they were asked many times by Mr. Barton and Ms. Mittelhauser in the Childsafe interview, well, what did they do with their hands when they touched you? What did their hands do? Remember, they didn't go beyond that, they didn't say anything beyond that, just said touching. Don't remember, don't recall.

⁷ The dissent cites *State v. Derenzy*, 89 S.W.3d 472 (Mo. banc 2002) and *State v. Cooper*, 215 S.W.3d 123 (Mo. banc 2007), in support of its finding of plain error. We do not find these cases persuasive because they present starkly different situations where the jury instructions did not meet a minimum threshold of legal sufficiency.

Derenzy involved the failure of the trial court to give a lesser-included offense instruction that was warranted by the evidence and requested by defense counsel. 89 S.W.3d at 475. In *Cooper*, plain error was found in the trial court's failure to include the element of *unlawful* entry in a verdict director for first-degree burglary. 215 S.W.3d at 123. By contrast, this case does not involve the omission of mandatory instructions or statutory elements that the jury was required to consider in determining the defendant's guilt. Plain error review is unwarranted because Ms. Celis-Garcia has failed to establish that the trial court has so misdirected or failed to instruct the jury that the instructional error affected the jury's verdict.

Ms. Celis-Garcia further argues that she may be subjected to double jeopardy because the verdict directors did not establish the precise dates of her offenses. She was convicted of a single act of sodomy against each child, but the evidence indicated that multiple acts occurred sometime between January 1, 2005, and March 31, 2006. Based on the lack of date specificity in the verdict directors, Ms. Celis-Garcia asserts there is a possibility that she could be charged with committing additional acts of sodomy against the children during that same time period.

Protections against double jeopardy arise from the Fifth Amendment to the United States Constitution, which provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb[.]" This provision protects defendants against (1) successive prosecutions for the same offense after either an acquittal or a conviction and (2) multiple punishments for the same offense. ***State v. Flenoy*, 968 S.W.2d 141, 143 (Mo. banc 1998).**

In ***State v. Douglas*, 720 S.W.2d 390, 395 (Mo.App. 1986)**, we rejected a claim that a verdict director was so vague as to place the defendant in danger of double jeopardy when it did not include information about the precise dates or methods by which the defendant sodomized the minor victim. We explained that a future trial court could consider the entire record in determining whether a

The dissent also relies on ***State v. Mitchell*, 704 S.W.2d 280 (Mo.App. 1986)**, which reversed the defendant's convictions on two counts of unlawful use of a weapon because the verdict directors were identical and did not differentiate between the locations where the offenses occurred. Notably, ***Mitchell*** did not involve plain error review because the defendant had objected to the verdict directors at trial. ***Id.* at 284.** Because there was no similar objection here, ***Mitchell*** is not instructive in determining whether Ms. Celis-Garcia is entitled to relief under plain error review.

defendant has been charged with an offense or conduct for which he was previously placed in jeopardy. *Id.*

Here, the jury was instructed to consider whether Ms. Celis-Garcia committed acts of sodomy against C.J. and K.J. during the period of January 1, 2005, and March 31, 2006. Based on this record, the Fifth Amendment protects Ms. Celis-Garcia from subsequent prosecutions for any act of sodomy against the same children that occurred during that same time period. The absence of a more specific date in the verdict director may actually benefit Ms. Celis-Garcia because it establishes an extended period of time for which she cannot be placed in double jeopardy for acts of sodomy against her children.

The verdict directors did not violate Ms. Celis-Garcia's constitutional rights to a fair trial, a unanimous jury verdict, and to be free of double jeopardy. Consequently, we find no plain error or manifest injustice in the submission of Instructions Nos. 6 and 7. Point I is denied.

2. Expert Witness Testimony

In Point II, Ms. Celis Garcia challenges the admission of certain testimony from two of the State's expert witnesses, Ellen Walls and Maria Mittelhauser. She argues that both experts rendered opinions about the truthfulness of C.J. and K.J., and thereby invaded the exclusive province of the jury to determine credibility in a case that hinged on the allegations of the children.

In child sexual abuse cases, two types of expert testimony are frequently challenged: general and particularized. ***State v. Churchill*, 98 S.W.3d 536, 539**

(Mo. banc 2003). "General testimony describes a 'generalization' of behaviors and other characteristics commonly found in those who have been the victims of sexual abuse." *Id.* The trial court has broad discretion in admitting this generalized testimony. *Id.* "Particularized testimony is that testimony concerning a specific victim's credibility as to whether they have been abused." *Id.* Particularized testimony is inadmissible and must be excluded "because it usurps the decision-making function of the jury." *Id.*

Ms. Celis-Garcia first contends the circuit court abused its discretion in overruling her objection to Ms. Walls's testimony regarding the consistency of C.J.'s and K.J.'s behavior with other child victims of sexual abuse. During Ms. Walls's direct examination, the following colloquy occurred:

PROSECUTOR: The behaviors that you have noticed with the girls and the disclosure they have made to you, based on your education, training and experience, are those all consistent with a child who has been sexually abused or assaulted?

DEFENSE COUNSEL: Objection, invades the province of the jury, calls for speculation and conjecture.

PROSECUTOR: This is an expert. She's an expert and I'm asking her her expert opinion in the matter.

THE COURT: Will you rephrase the question one more time?

PROSECUTOR: I will.

PROSECUTOR: Ma'am, based upon your education, training and experience, the behaviors that you have personally observed with these little girls, and the disclosures that they have made to you, are they consistent with a child that has been sexually abused?

DEFENSE COUNSEL: Same objection, judge.

THE COURT: Overruled.

MS. WALLS: Yes, their behaviors are consistent with experiencing a very traumatic event.

PROSECUTOR: Okay. Are there any behaviors or any disclosures they made to you, that again based on your education, training and experience, you have found to be inconsistent with a child who has been sexually abused?

DEFENSE COUNSEL: Same objection.

THE COURT: Overruled.

MS. WALLS: No.

The circuit court properly overruled Ms. Celis-Garcia's objection because Ms. Walls only gave a general explanation that the children's conduct and statements were indicative of sexual abuse. Generalized opinions are "clearly within the province of allowable expert testimony" when the witness does not offer any opinion as to the credibility of another witness, as to the credibility of abuse victims in general, or as to whether the alleged abuse has in fact occurred. ***State v. Silvey*, 894 S.W.2d 614, 671 (Mo. banc 1995)**. Expert testimony is admissible when it comments on how a child's behavior relates to the general behavior of someone who has been abused. ***State v. Chism*, 252 S.W.3d 178, 183 (Mo.App. 2008)**. Thus, we find no abuse of discretion in the admission of this testimony by Ms. Walls.

Ms. Celis-Garcia seeks plain error review of additional testimony by Ms. Walls and Ms. Mittelhauser. She argues the circuit court erred in failing to *sua*

sponte prevent the experts from testifying that they had no reason to believe the children were not being truthful regarding the sexual abuse allegations. Because Ms. Celis-Garcia failed to object to this testimony, we can only reverse if we find plain errors affecting her substantial rights that would result in manifest injustice if not corrected. **Rule 30.20.**

The prosecutor questioned Ms. Walls as follows during her direct examination:

PROSECUTOR: Okay. Ma'am, during the counseling sessions that you had provided these girls over the past 20 months, had they ever provided you any information that gave you reason to doubt the truthfulness of what they were telling you?

WALLS: No, they've been consistent in what they have said. They have talked about the traumatic event, they have given a consistent story of what happened. They have sometimes added new pieces of information, but not anything that contradicted their original story.

Ms. Celis-Garcia's counsel did not object to this question or response.

However, defense counsel extensively cross-examined Ms. Walls regarding the basis for her conclusion that the children were being truthful. The cross-examination established that Ms. Walls had never seen the children's statements or video depositions and that she had not spoken with their grandmother or any neighbors, friends, or relatives of the family about the allegations. (Tr. 414-16)

Ms. Walls confirmed that she had not conducted any investigation into the sexual abuse allegations, and she was not "privy to everything" in the police investigation. (Tr. 415-16)

The prosecutor also questioned Ms. Mittelhauser, during direct examination, about the truthfulness of the children's allegations:

PROSECUTOR: Okay. At anytime and during the interview process did you ever get information or answers from either [K.J.] and [C.J.] that caused you to believe they were being not truthful?

MS. MITTELHAUSER: No.

Defense counsel did not object to this question or response but promptly cross-examined Ms. Mittelhauser to establish that she had not made any effort to determine whether the children were being truthful. (Tr. 454-55, 460) Defense counsel got Ms. Mittelhauser to admit that she did not challenge any inconsistencies or confront the children with information obtained from other sources.

During closing argument, the prosecutor briefly referenced the testimony of both experts in addressing defense arguments that the children were "liars:"

They were interviewed by a professional interviewer, Ms. Mittelhauser. I asked her, did it appear to you anything, that they were coached or not being truthful? No. Ellen Walls, any indications that they were being less than truthful or that they were making things up? No.

The State acknowledges that this line of questioning and argument was "objectionable" because it is improper for an expert witness to render an opinion concerning a specific victim's credibility as to whether they have been abused. Despite this impropriety, the admission of the particularized testimony does not necessarily constitute plain error. ***State v. D.W.N.*, 290 S.W.3d 814, 825 (Mo.App. 2009)**. Because there was no objection, the issue here is whether the

circuit court was obligated to *intervene* and prevent the witnesses from testifying. Trial judges are not expected to assist counsel in trying cases and should act *sua sponte* only in “exceptional circumstances.” ***State v. Buckner*, 929 S.W.2d 795, 799-800 (Mo.App. 1996)**. In many situations, “a trial judge’s intervention in the proceedings may be unwelcome, as the failure to raise an objection may be a matter of trial strategy.” ***State v. Roper*, 136 S.W.3d 891, 902 (Mo.App. 2004)**.

As noted herein, when Ms. Walls gave generalized testimony about the children’s behavior being consistent with victims of sexual abuse, defense counsel objected three times that the testimony “invade[d] the province of the jury.” Yet, when Ms. Walls and Ms. Mittelhauser gave particularized testimony about the truthfulness of the victims, defense counsel did not object and, instead, opted to vigorously cross-examine the experts on the basis for their opinions. This tactical approach indicated a chosen defense strategy of seeking to discredit the experts rather than challenge the admissibility of their testimony. Apparently second-guessing this trial strategy, Ms. Celis-Garcia now seeks to have it both ways by arguing that the testimony was inadmissible and the circuit court plainly erred in failing to exclude it.

No plain error arises when a trial court fails to *sua sponte* prevent the introduction of objectionable evidence in circumstances clearly indicating that trial counsel chose not to object to the evidence. ***D.W.N.*, 290 S.W.3d at 825**. To hold otherwise would put the circuit court in a no-win position:

If the trial court received the evidence and allowed a witness to testify that he or she found the victim credible, the accused could . . . claim receipt of the evidence was plain error, requiring reversal. If the trial court *sua sponte* excluded the evidence, the accused could contend on appeal that the trial court improperly interfered by barring evidence which the accused consciously chose to allow the jury to hear, thereby requiring reversal. To state the scenario is to expose its potential for mischief.

***Id.* (quoting *State v. Hamilton*, 892 S.W.2d 774, 781 (Mo.App. 1995)) (brackets omitted).**

Ms. Celis-Garcia's current complaints about the testimony of Ms. Walls and Ms. Mittelhauser must be viewed in light of her counsel's extensive cross-examination of these experts. Defense counsel made a strategic decision not to object and then used the direct examination testimony as a basis for attacking the credibility of the experts. Although the prosecutor's questions were objectionable, the circuit court did not plainly error in failing to intervene and exclude the evidence under the circumstances of this case.

Even if we found plain error, Ms. Celis-Garcia would not be entitled to relief because she cannot demonstrate that the admission of the expert testimony resulted in manifest injustice. Courts have found prejudice or manifest injustice in situations where an expert improperly offers an opinion that bolsters the credibility of a victim and the case hinges on the credibility of that victim because there were no witnesses or physical evidence of sexual abuse. ***Churchill*, 98 S.W.3d at 538-39; *State v. Williams*, 858 S.W.2d 796, 800-01 (Mo.App. 1993).** However, the admission of an expert's particularized testimony may constitute harmless error if

there is other evidence to corroborate the victim's allegations. *Chism*, 252 S.W.3d at 184 (citing *State v. Collins*, 163 S.W.3d 614, 623 (Mo.App. 2005)).

Here, the State's case did not rest entirely upon the individual allegations of K.J. and C.J. about the acts of sexual abuse. There was evidence of a SAFE examination that revealed C.J. had missing hymenal tissue, consistent with vaginal penetration. A police officer testified that hooks and holes were found on the wall of a bedroom where K.J. said she had been handcuffed and hung on a hook by her mother and Mr. Flores during the incidents of touching. A caseworker also testified that she saw scars on K.J.'s wrists from the handcuffs. Both children were present during many of the abusive acts and provided corroboration for each other's accounts.

As in *Chism*, we believe the collective presence of this corroborative evidence more likely persuaded the jury to believe the victims than the bolstering testimony of the experts. *Id.* Ms. Celis-Garcia is not entitled to relief under Rule 30.20 because she has failed to demonstrate a plain error that affected her substantial rights and resulted in manifest injustice. Point II is denied.

CONCLUSION

We affirm the circuit court's judgment of convictions.

LISA WHITE HARDWICK, JUDGE

J. SMART CONCURRING.

J. AHUJA DISSENTS IN SEPARATE DISSENTING OPINION.



**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI,)	
RESPONDENT,)	
v.)	
MAURA L. CELIS-GARCIA,)	WD69199
APPELLANT.)	FILED: April 20, 2010

DISSENTING OPINION

I believe that the trial court plainly erred in failing to instruct the jury more specifically as to the particular acts which it was required to find that Appellant Celis-Garcia committed, or assisted in committing, and thereby denied Celis-Garcia her constitutional right to have unanimous jury concurrence in her guilt. I would grant Celis-Garcia's first Point Relied On, reverse her convictions, and remand for a new trial.

After her first trial ended in a hung jury, Celis-Garcia was convicted of two counts of first-degree statutory sodomy, one count relating to each of her two child victims. The first element of the verdict directors on each count required the jury to find only "that between the dates of January 1, 2005 and March 31, 2006, in the County of Saline, State of Missouri, that defendant or Jose F. Flores places her or his hand on [C.J.'s or K.J.'s] genitals."¹ Before and at

¹ Apparently inadvertently, the verdict directors expanded the three-month period over which Celis-Garcia was charged with first-degree statutory sodomy (January 1, 2006 through March 31, 2006), into a fifteen-month period (from January 1, 2005 through March 31, 2006). As noted by the majority, Celis-Garcia does not take issue with this date discrepancy on appeal, or with the fact that the jury was permitted to find that either Celis-Garcia or Jose Flores engaged in the prohibited hand-to-genital contact.

trial, the two child victims described multiple incidents of alleged sexual abuse which occurred at different times, and in a number of different locations: on the enclosed porch behind the house where they lived; in Celis-Garcia's bedroom and/or bedroom closet; in the bathroom when the girls were bathing; and in a shed physically separate from the home. Given the verdict directors, it is impossible to know whether the jury unanimously found beyond a reasonable doubt that any of these specific incidents of sexual contact had occurred, and if so, which one (or ones).

In *State v. D.W.N.*, 290 S.W.3d 814 (Mo. App. W.D. 2009) (en banc), this Court recently summarized the law relating to a defendant's right to a unanimous verdict in criminal cases, and the manner in which vague or disjunctive jury submissions may deny a defendant this right:

The Missouri Constitution provides "[t]hat the right of trial by jury as heretofore enjoyed shall remain inviolate[.]" Mo. Const. art. I, § 22(a). This right to trial by jury includes "all the substantial incidents and consequences that pertain to the right to jury trial at common law." This includes the right to have the jury's unanimous concurrence in the verdict.

Prior cases have held that the disjunctive submission of an element of an offense in a single instruction runs afoul of a defendant's constitutional right to a unanimous concurrence in the verdict. This is because an instruction that submits a proof element in the disjunctive creates a situation where some of the jurors may have agreed that he was guilty of the offense because he committed one act while the other jurors believed that he was guilty because he committed another act.

Id. at 827-28 (other citations omitted); *see also United States v. Gipson*, 553 F.2d 453, 457-58 (5th Cir. 1977) ("The unanimity rule . . . requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged.").

In *State v. Oswald*, 306 S.W.2d 559 (Mo. 1957), the verdict directing instruction in a sodomy prosecution "authorized a conviction . . . if the jury found that appellant inserted his genital organ into 'the mouth and rectum' of the [victim] or 'committed either of such aforesaid acts.'" *Id.* at 563. Because the verdict director did not require the jury to unanimously concur as

to the specific act it found the defendant had committed, the Missouri Supreme Court reversed his conviction, and remanded for a new trial.

The State refers us to no case holding a general verdict proper upon the trial of an indictment or information charging an appellant with the commission of two offenses in one count. An accused is entitled to the concurrence of twelve jurors upon one definite charge of crime. Under the charge and the verdict some of the jurors may have agreed appellant was guilty of an offense committed with the mouth of the [victim], while others may have reached the same result with respect to an offense committed with the rectum. It cannot be determined that there was a concurrence of twelve jurors upon one definite charge of crime.

Id.

Similarly, *State v. Mitchell*, 704 S.W.2d 280 (Mo. App. S.D. 1986), reversed a defendant's conviction of two counts of unlawful use of a weapon, where the verdict directors for each count were identical, even though the allegedly unlawful conduct occurred in two different locations on the same day. *Id.* at 286. In finding that the lack of differentiation between the two counts required a new trial, *Mitchell* emphasized that "defense counsel, through cross-examination of the State's witnesses and the presentation of defense witnesses, sought to discredit the State's evidence and to extenuate defendant's conduct at [the first location] and at [the second location]"; accordingly, "the jury . . . had to decide whether defendant's actions during either, or both, of the incidents mentioned in the evidence constituted a violation," but under the instructions there was no way to determine how they had done so. *Id.*; see also *State v. Pope*, 733 S.W.2d 811, 812-13 (Mo. App. W.D. 1987) (reversing convictions where the single verdict directors as to each of two minor victims were broad enough to include multiple allegations of sexual improprieties described in the victims' trial testimony, some of which went beyond the allegations in the indictment).²

² It appears that contemporaneous objections to the offending instructions were made in *Oswald*, *Mitchell* and *Pope*. I nevertheless believe the legal principles announced in those cases are relevant to our plain-error review here.

The majority recognizes that, under the unanimity rule, jurors must be “in substantial agreement regarding the defendant’s specific conduct” as a necessary prerequisite to a finding of guilt. Op. 7; *see also id.* (“as one element of the charge of first-degree statutory sodomy, the jury is required to determine whether the defendant was involved in *a specific physical act* constituting deviate sexual intercourse” (emphasis added)). The majority finds that the verdict directors here required the jurors to agree on Celis-Garcia’s “specific conduct” because – unlike in *Oswald* – “the jury was only asked to consider whether Ms. Celis-Garcia was involved in an act of hand-to-genital contact with each of the children. The specific act of sodomy was not presented in the disjunctive.” Op. 8. But while Celis-Garcia may only have been accused of one *type* of prohibited conduct, the evidence would have allowed jurors to find that she engaged in such conduct on any one of multiple different occasions. Thus, although the verdict directors referred to only a single *kind* of criminal act, they effectively charged Celis-Garcia in the disjunctive: under the instructions the jury could convict her if it found that she engaged or assisted in hand-to-genital contact with the children during an incident in her bedroom, or in the bedroom closet, or in the bathroom, or in the enclosed porch, or in the shed structure. These incidents were separated not only in location, but also in time: although the children could understandably not be specific as to the dates on which particular alleged abuse occurred, their various statements and testimony indicate that the events occurred at different times, and were not part of any uninterrupted course of action.

At least in the context of this case, the requirement that jurors agree on Celis-Garcia’s “specific conduct,” or her commission of a “specific physical act,” must refer to a specific event which occurred at a specific point in time (even if her child victims could not precisely identify that time). The jury-unanimity requirement cannot simply mean that the jurors had to agree that

she engaged in actions of a particular nature or type. Consider a defendant charged with a single count of burglary, but implicated in the burglaries of multiple homes over the same fifteen-month time span submitted here. Even if evidence of the multiple burglaries was admitted at trial, I assume this Court would reverse a conviction if the jury was instructed in a single verdict director that it was required to find only that the defendant, during this fifteen-month span, unlawfully entered the (unspecified) property of another with the intent of committing a crime therein. I assume this Court would have no difficulty concluding that such a generic submission violated the defendant's right to a unanimous verdict, even though the hypothesized instruction describes a single *type* of conduct which the defendant allegedly committed (*i.e.*, unlawful entry into the premises of another with the intent of committing a crime inside).

The majority's conclusion that the jury-unanimity requirement was satisfied because only hand-to-genital contact was submitted cannot be squared with *Mitchell*, 704 S.W.2d 280. *Mitchell* also involved separate incidents involving the same generic type of conduct: knowingly exhibiting a firearm in an angry or threatening manner in the presence of one or more other persons. *Id.* at 284. Under the majority's reasoning, the identical verdict directors in *Mitchell* were not erroneous, since they identified "the specific act" of unlawful use of a weapon (among several alternatives, *see* § 571.031.1(1)-(8), RSMo Cum. Supp. 1983). Yet despite the identification of a specific *type* of unlawful use of a weapon in the verdict directors, *Mitchell* found the instructions erroneous because "it was impossible for the jury to know which incident was the subject of" which verdict director, *id.* at 284, and the two incidents could have been readily distinguished by location. *Id.* at 285.

As the majority notes, the Missouri Approved Instructions address a comparable situation, where a defendant is accused of multiple similar offenses. Where distinction of

multiple offenses by time is not possible, the MAI-CR 3d directs that “the instruction should be modified by the Court to identify the occurrence by some other reference.” MAI-CR 3d 304.02, Notes on Use 4(c). The Notes on Use go on to specifically observe:

The place of the offense may become of “decisive importance” under certain circumstances, such as . . . where the defendant may have committed several separate offenses against the same victim at the same general location within a short space of time.

In such a situation, upon request of the defendant or on the Court’s own motion, the place should be more definitely identified, such as “the front bedroom on the second floor,” “the southeast corner of the basement,” etc.

Notes on Use 5. As these Notes on Use suggest, the trial court in this case could, and should, have included more specifics as to the location or other distinguishing characteristics of the separate incidents described in the evidence, any one of which could have supported Celis-Garcia’s conviction. *See also* MAI-CR 3d 304.16 (pattern instruction for alternative submissions under a single count).

I recognize that appellate decisions have frequently rejected a defendant’s argument that a particular jury submission violated his right to a unanimous jury verdict, either where the error was preserved, or where – as here – a defendant was limited to seeking plain-error review. The majority discusses one such case, *State v. Smith*, 32 S.W.3d 134 (Mo. App. E.D. 2000), at considerable length. Op. 10-11. However, in *Smith*, although confusingly similar – but separate – instructions were submitted as to two separate offenses, the court was able to find no unanimity problem because the jury was instructed to consider each count separately, and it acquitted of one charge but not the other, thus demonstrating convincingly that the jury followed the instructions and distinguished between the charges submitted in the two verdict directors. 32 S.W.3d at 135-36. Because it involved separate verdict directors charging multiple offenses, and a verdict which showed the jury’s separate consideration of each offense, I cannot agree with the

majority that “[t]his case is analogous to *Smith*.” Op. 12.³ Other cases which have rejected jury-unanimity arguments also involve situations which are importantly different from this case.

Thus, in a number of such cases, the separate alleged offenses occurred in close temporal proximity to one another, and were the subject of identical evidence; the court could thus confidently conclude that the failure to submit offenses separately did not impact the jury’s deliberations.⁴ In another case, the court emphasized that despite similar verdict directors as to multiple counts, “during closing argument, the prosecutor identified in great detail the specific evidence relating to the individual circumstances of each count.”⁵

³ At least two other decisions involve situations similar to *Smith*: multiple (albeit similar and vaguely worded) verdict directors submitting separate offenses, and acquittal on some but not all counts. *State v. Marley*, 257 S.W.3d 198, 201 (Mo. App. W.D. 2008) (prosecutor’s closing argument also distinguished underlying offenses submitted in different counts); *State v. Jennings*, 761 S.W.2d 642, 644 (Mo. App. W.D. 1988) (noting also that closing arguments distinguished similarly-worded counts).

⁴ See, e.g., *D.W.N.*, 290 S.W.3d at 827, 829 (jury instructed that it could find defendant guilty if it found that he had “touched the genitals or breast of [the victim]”; “Because the complained-of deviate acts of sexual misconduct occurred in one event, we conclude that D.W.N. has failed to demonstrate that the trial court so misdirected the jury that the instructional error affected the jury’s verdict and caused manifest injustice.”); *State v. Staples*, 908 S.W.2d 189, 190-91 (Mo. App. E.D. 1995) (two separate rapes charged in two identical verdict directors; no error where “[b]oth rapes took place in the car as it was parked in the same isolated parking lot, and the circumstances of each rape were almost identical”; “the necessary proof of each charge came from once source, the testimony of the victim,” and “[d]efendant’s defense did not depend upon surrounding facts and circumstances which differed greatly from count to count”); *State v. Wilkins*, 872 S.W.2d 142, 146-47 (Mo. App. S.D. 1994) (no plain error where single verdict director submitted touching of breasts or genitals in the disjunctive, because “[i]n the instant case, the touching occurred simultaneously as one event”); *State v. Mackey*, 822 S.W.2d 933, 935, 936 (Mo. App. E.D. 1991) (verdict director requires jury to find that defendant placed his “mouth or hand on the [victim’s] genitals”; emphasizing that “the sexual abuse took place simultaneously on a single day . . . and within the time frame when the victim’s mother was in the shower and [the victim’s brother] was at school”); *State v. Cody*, 801 S.W.2d 430, 433 (Mo. App. E.D. 1990) (“In the present case, each of the two distinct acts of rape and two distinct acts of sodomy occurred over a short period of time, in the same location and under almost identical circumstances. Defendant’s defense did not depend upon surrounding facts and circumstances which differed greatly from count to count; rather, the only real issue for the jury regarding the separate counts was the credibility of the victim’s testimony.”).

While in *State v. Rudd*, 759 S.W.2d 625 (Mo. App. S.D. 1988), the rapes with which defendant was charged occurred at different times, the location and circumstances of each rape were the same, and the court emphasized that “the defendant has suggested no defense, and we perceive none, which was inhibited by the State’s failure to aver commission of the acts charged [in multiple count] more specifically.” *Id.* at 628; see also *State v. Burch*, 740 S.W.2d 293, 295-96 (Mo. App. E.D. 1987). Here, not only was there a basis to distinguish various acts (based on the location where they occurred), but as discussed *infra* Celis-Garcia offered distinct reasons based on the evidence why the jury should reject various individual accusations.

⁵ *State v. Johnson*, 62 S.W.3d 61, 69 (Mo. App. W.D. 2001) (also noting that “the fact that the jury subsequently acquitted the appellant on one of the sodomy counts would be some indication that it was ultimately able to

Notably, however, even the cases which reject such jury-unanimity arguments emphasize that, “[t]o overcome the problem of the jury returning a non-unanimous verdict, disjunctive submissions of acts, especially those which constitute the gravamen of the offense, should be curtailed.” *Mackey*, 822 S.W.2d at 936; *see also Smith*, 32 S.W.3d at 136 (“We have no hesitation in saying that the prosecution should have made it clear that the two instructions applied to different incidents. This could have been accomplished simply by including more detail as to the location of each offense.”).⁶

In this case, although the defense argued generally that the children had fabricated their accounts of sexual abuse because of their desire to remain in their foster placement, Celis-Garcia also sought to exploit specific inconsistencies or doubts concerning the individual incidents or categories of incidents the children had described. For example, the children alleged that various incidents (for example, one that began in the bathroom) ended when their grandmother responded to their calls for help; at other times one or both children had claimed that their grandmother was aware of the abuse, and had even made and watched videotapes of it. Their grandmother denied any knowledge of alleged abuse, or that she had prevented or terminated any abusive incident. As to claims of being handcuffed in Celis-Garcia’s bedroom or the closet of that bedroom, the defense noted that K.J. had physically demonstrated inconsistent methods by

differentiate between them,” and that “appellant’s defense to the offenses . . . was not dependent on the differentiation between counts”).

⁶ *See also State v. Marks*, 721 S.W.2d 51 (Mo. App. W.D. 1986):

There are cases where submissions in the disjunctive have been held bad in that they allowed for a non-unanimous verdict. Those cases, however, are those where the gravamen of the offense has been submitted alternatively. . . . But the disjunctive submission was as to the very act which was the gravamen of the offense. And it is true that the jury must agree on “just what the defendant did.”

id. at 54 (citations omitted); *State v. Brigham*, 709 S.W.2d 917, 922 (Mo. App. S.D. 1986) (“The disjunctive submission of an element of an offense in a single instruction can present an issue of unanimity. The disjunctive submission of two distinct acts by which an offense could have been committed has been held to be erroneous.” (citations omitted)).

which the children were handcuffed, and had claimed in one interview to having been handcuffed behind her back, which other witnesses had testified was inconsistent with the handcuffs being attached to hooks on the wall. The prosecution's evidence was inconsistent as to whether the girls showed wounds or scarring on their wrists consistent with handcuff use, which was particularly significant since C.J. had described being restrained by handcuffs with her feet off the ground. The girls' deposition testimony was also inconsistent as to whether handcuffs had been used anywhere other than in the bedroom or bedroom closet. One or both children testified to an incident in which they escaped from the handcuffs, ran to their grandmother, and then retreated to an aunt's house; yet no corroboration of such an incident beyond the girls' accounts was offered. K.J. and C.J. disagreed, at least in some of their statements, as to which adult would take which child when certain incidents of abuse allegedly occurred. The girls' descriptions of the bathroom incident were also inconsistent as to whether they were bathing or showering, and as to whether the girls were bathing together, and both naked, or instead whether one was partially clothed and preparing to enter the bath as the other finished. The defense also emphasized the proximity between the grandmother's bedroom and where certain acts of abuse allegedly occurred, arguing that it was implausible that these acts could have occurred without the grandmother's knowledge. Further, although C.J. described abuse which had occurred in a shed separated from the girls' home, K.J. denied that any abuse had occurred there.

Of course, the jury was entitled to reject the defense's efforts to counter the girl's statements, and it only needed to find that one incident as to each child, among the several described, in fact occurred. But the fact that Celis-Garcia substantially relied on specific discrepancies or evidentiary inconsistencies relating to specific abuse allegations, and that there

is no way to know under the verdict directors whether the jury unanimously found that any particular incident had occurred, distinguishes this case from those described above, in which jury-unanimity arguments have been rejected. The nature of Celis-Garcia's defense also leads me to conclude that – unlike in those cases – the failure to properly instruct the jury could well have led to a non-unanimous finding of guilt. The fact that Celis-Garcia's first trial ended in a hung jury only heightens these concerns.⁷

I recognize that many cases state that plain-error relief is only available with respect to a defective jury instruction when “the trial court has so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury’s verdict.” *State v. Marley*, 257 S.W.3d 198, 201 (Mo. App. W.D. 2008) (citations and internal quotation marks omitted); *see also, e.g., State v. Wright*, 30 S.W.3d 906, 912 (Mo. App. E.D. 2000). Here it is impossible to know whether the jury in fact convicted Celis-Garcia based on its unanimous agreement as to her “specific conduct” with respect to each child, or instead whether individual jurors concluded that she had committed, or assisted in the commission of, different acts of hand-to-genital contact. The Missouri Supreme Court has not required a conclusive demonstration that a jury was in fact influenced by an erroneous instruction in order to support plain-error relief, however. In *State v. Derenzy*, 89 S.W.3d 472 (Mo. banc 2002), the Court found plain error where the trial court had failed to give a lesser-included offense instruction to which the defendant was entitled; although the defendant was convicted of a greater offense (and there was no challenge to the sufficiency of the evidence to support that conviction), the Court nevertheless

⁷ The State argues that Celis-Garcia's claim is significantly *weaker* than the claim in other cases because here, “the verdict directors were clearly differentiated in that each referred to a separate victim.” But this contention misses Celis-Garcia's point: she does not argue that the jury was not required to unanimously agree that she had separately engaged in prohibited conduct with respect to each victim, but that the jury was not required to unanimously agree on the prohibited act she had committed with respect to either victim. The fatal vagary here is not *between* the two verdict directors involving different victims, but *within* each verdict director relating to a single victim.

concluded that plain-error relief was appropriate because “[a]ppellant could reasonably have been acquitted on the greater delivery [of a controlled substance] offense, yet convicted of the lesser possession offense.” *Id.* at 475. Similarly, the Supreme Court found plain error where an instruction omitted an element of the offense whose existence was contested at trial; while the Court recognized that the evidence would have supported a finding that the omitted element existed, the jury *could* also have found the omitted element unsatisfied. *State v. Cooper*, 215 S.W.3d 123, 126 (Mo. banc 2007). Plain-error relief was warranted in *Cooper* because “[t]here is simply no way to know” whether inclusion of the omitted element would have changed the jury’s verdict. *Id.*⁸ Under *Derenzy* and *Cooper*, the failure to require the jury here to unanimously agree on the particular act Celis-Garcia committed warrants plain-error relief.⁹

I am aware that caselaw recognizes the need to allow the prosecution a certain degree of latitude in specifying the details of offenses committed against minor victims, both in charging documents and in jury instructions. For example, it may often be impossible to specify the dates on which particular alleged offenses occurred, and it may instead only be feasible to charge and submit offenses based on relatively wide date ranges. I also recognize that, even if the verdict director or directors in this case had specified particular locations where alleged hand-to-genital contact had occurred, this would not necessarily have required the jury to agree on Celis-Garcia’s commission of a particular, discrete act, because the children stated that multiple incidents had occurred in several of those locations. Nevertheless, the fact that a certain level of

⁸ It also bears emphasis in this context that “the trial court has a *sua sponte* duty to instruct the jury on the correct law, as to a substantial right, to insure that the defendant receives a fair trial”; thus, plain-error relief may be available even where the defendant affirmatively states “no objection” to a later-challenged instruction, or has himself tendered the complained-of instruction. *State v. Goodine*, 196 S.W.3d 607, 617 (Mo. App. S.D. 2006) (citation omitted). Accordingly, the fact that Celis-Garcia’s counsel proposed lesser-included offense instructions which used the same vague description as the instructions she now challenges does not foreclose plain-error relief.

⁹ Contrary to the majority, I believe the failure here to require the jury to unanimously agree as to *what precisely Celis-Garcia did* is comparable to the failure to require jury consideration of individual contested elements of an offense, or the defendant’s possible guilt of a lesser-included offense, the defects at issue in *Derenzy* and *Cooper*.

imprecision is inevitable and permissible does not, and should not, mean that the trial court may properly refuse to provide the jury with the level of specificity and focus which the evidence in a particular case in fact permits. Indeed, the understandable vagaries in the testimony of young children concerning such heinous acts makes it *more* important – not less – that the jury be given as specific direction to guide its deliberations as the victims’ accounts will permit. Here, the children’s testimony plainly lent itself to distinguishing particular claimed events, or groupings of events, based on the location where they allegedly occurred, a form of distinguishing reference which the MAI-CR 3d specifically endorses. While this may not have forced the jury to focus on individual, discrete events, it would at least have required the jury to make findings that considered Celis-Garcia’s challenges to the credibility of various categories of events, and given some assurance that the jury in fact unanimously agreed to her guilt based on a specific accusation.

For these reasons, I respectfully dissent.¹⁰

Alok Ahuja, Judge

¹⁰Based on my belief that Celis-Garcia’s first Point Relied On mandates a new trial, I find it unnecessary to address her second Point. I note, however, my serious reservations with the majority’s conclusion that Celis-Garcia forfeited her right to plain-error review because her attorney’s “extensive cross-examination” of the State’s experts, and counsel’s objections to *other* testimony of one of the experts, indicates that counsel “made a strategic decision not to object” to the experts’ testimony vouching for the victims’ credibility. Op. 19. In order to find a waiver of plain-error review, our Supreme Court has explained that “counsel [must have] affirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or negligence.” *State v. Johnson*, 284 S.W.3d 561, 582 (Mo. banc 2009) (citation omitted). Aside from cases in which defense counsel has expressly stated that he or she has no objection to particular evidence, or has made and then withdrawn an objection, an intentional waiver of plain-error review has only been found where a defendant “affirmatively invited and/or relied upon the evidence he later challenges.” *State v. D.W.N.*, 290 S.W.3d 814, 836 (Mo. App. W.D. 2009) (en banc) (Ahuja, J., dissenting). This does not appear to be such a case.